81-1839

No._____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1981

MINNEAPOLIS STAR AND TRIBUNE COMPANY,
Appellant,

vs.

MINNESOTA COMMISSIONER OF REVENUE,
Appellee.

ON APPEAL FROM THE MINNESOTA SUPREME COURT

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Is the use tax imposed by Minn. Stat. §297A.14 on paper and ink consumed in publishing newspapers a "tax on knowledge" prohibited by the First Amendment?

2. By exempting from taxation the first $100,000 of paper and ink consumed annually by each publication, with the result that 97 percent of Minnesota's publishers pay no use tax while appellant alone pays two-thirds of the use taxes collected, does Minn. Stat. §297A.14 violate the First Amendment by discriminatorily restricting the speech of large publishers and enhancing the relative voice of small publishers?

3. By exempting from taxation the first $100,000 of paper and ink consumed annually by each publication, does Minn. Stat. §297A.14 deny equal protection of the laws and violate the Fourteenth Amendment by effectively imposing a graduated tax on the volume of a publisher's business activity?

4a. If a tax on the sale of newspapers would abridge freedom of the press, can Minnesota constitutionally impose a special "compensating use tax" under Minn. Stat. §297A.14 upon the paper and ink consumed by the tax-exempt newspapers?

b. Assuming that a tax on the sale of newspapers would be constitutional, can Minnesota, consistent with the First and Fourteenth Amendments, impose pursuant to Minn. Stat. §§297A.14 and 297A.25 a use tax as a substitute for a sales tax upon newspaper publishers, whereas other industrial users of paper and ink pay no use tax but their products are subject to sales tax, when the differing tax treatment is not necessary to accomplish a compelling state interest?

LIST OF PARTIES

In addition to the parties contained in the caption of this case in this Court,[1] the Minnesota Civil Liberties Union appeared as *amicus curiae* in support of appellant before the Minnesota Supreme Court.

[1] Appellant has no parent company. Its sole subsidiary (except wholly owned subsidiaries) is Information Publishers, Inc., a Minnesota corporation. Appellant is affiliated with the Des Moines Register and Tribune Company by common individual shareholders and by the ownership by the Des Moines Register and Tribune Company of 13% of appellant's outstanding stock.

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The Minneapolis Star and Tribune Company ("Star Tribune"), appellant herein, appeals from a January 5, 1982, judgment of the Minnesota Supreme Court upholding the constitutionality of Minn. Stat. §297A.14, which taxes newspapers' consumption of paper and ink in excess of $100,000 per year. The challenged use tax affects only a few publishers of Minnesota's largest daily newspapers; 97 percent of the State's publishers pay no such tax.

The Minnesota Supreme Court's opinion (A-1-19) is published at 314 N.W.2d 201 and at 7 Med. L. Rptr. 2579. The opinion of the Hennepin County District Court (A-49-66) in favor of Star Tribune has not been reported.

GROUNDS OF JURISDICTION

Star Tribune commenced this tax refund action in the Minnesota State courts, specifically challenging the validity of Minn. Stat. §§297A.14 and 297A.25 on the ground that these State statutes are repugnant to the freedom of press and equal protection clauses of the First and Fourteenth Amendments to the United States Constitution. The Minnesota Supreme Court upheld the challenged statutes, reversing a judgment of the Hennepin County District Court which had held the challenged statutes invalid on all grounds asserted.

This Court has jurisdiction by appeal pursuant to 28 U.S.C. §1257(a). The judgment appealed from was entered on January 5, 1982. (A-66.) Notice of appeal to this Court was duly served on all parties on March 10, 1982, and timely filed in the Minnesota Supreme Court on March 12, 1982. (A-68.) See 28 U.S.C. §2101(c).

CONSTITUTIONAL PROVISIONS AND STATUTES

First Amendment, United States Constitution:

"Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

Section One, Fourteenth Amendment, United States Constitution:

". . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statutes:

The full text of the relevant Minnesota statutes is set forth in the Appendix (A-70-90). The statutory provision most directly at issue in this appeal is the following paragraph of Minn. Stat. §297A.14 (1974):

"Notwithstanding any other provisions of sections 297A.01 . . . to the contrary, the cost of paper and ink products exceeding $100,000 in any calendar year, used or consumed in producing a publication as defined in Section 297A.25, subdivision 1, clause (i) is subject to the tax imposed by this section."

STATEMENT OF THE CASE

This appeal involves Star Tribune's claim for a refund of $874,265.04 of use taxes paid to Minnesota on paper and ink consumed in producing publications from January 1, 1974, through May 31, 1975. A refund claim was filed with the Sales and Use Tax Division of the Minnesota Department of Revenue on August 5, 1975, and was denied the next day. Star Tribune commenced this tax-refund action on August 27, 1975, pursuant to Minn. Stat. §297A.35.

During 1974 and 1975, Star Tribune published the morning *Minneapolis Tribune* six days a week and Sunday, and the evening *The Minneapolis Star* six days a week. Both newspapers are "publications" as defined in Minn. Stat. §297A.25, subd. 1 (i), and are Minnesota's two largest-circulation paid-subscription daily newspapers.

In 1967, Minnesota for the first time imposed a tax on the sale of tangible personal property. (1967 Minn. Laws, 1st Sp. Sess., Ch. 32.) The tax rate began at 3 percent, rose to 4 percent in 1971 (A-74) and to 5 percent in 1981 (A-2, n.1).

Section 14 of the 1967 Act (Minn. Stat. §297A.14) established a use tax payable on "the privilege of using, storing or

consuming in Minnesota tangible personal property," unless the sales tax had been paid on this property. Minnesota explicitly characterizes the use tax as "a compensating or complementary tax." See 14 Minn. Code of Agency Rules, Tax S & U 300 (1979).

The 1967 Act totally exempted, first, the sale of publications and the sale of materials used to produce publications, Minn. Stat. §297A.25, subd. 1 (i); and second, the sale of materials used or consumed in the industrial production of personal property intended ultimately to be sold at retail, Minn. Stat. §297A.25, subd 1 (h). For convenience, Star Tribune will refer to these two exemptions as the "publications exemption" and the "industrial user exemption."

Effective November 1, 1971, the publications exemption was amended to exclude the use of paper and ink consumed in producing publications. (A-77.) Minnesota thereby imposed a use tax on all such paper and ink. The 1971 Legislature did not change the exemption for industrial users, whose consumption of paper, ink and other products continued to be exempt from any use tax regardless of whether sales of their end products were subject to, or exempt from, the sales tax.

Effective January 1, 1974, the publications exemption was again amended so as to impose the use tax on consumption of paper and ink by publications only to the extent that the cost of those products consumed in any calendar year exceeded $100,000 per publication. As a consequence, 97 percent of Minnesota publishers pay no use tax; only "large Minnesota publishers"—who consume more paper and ink because they pub-

lish more pages, more often, to more people[2]—pay any use tax on their consumption of paper and ink.

During 1974 and 1975, approximately 400 paid-circulation newspapers were published in Minnesota. Approximately 90 percent had publication schedules of twice a week or less; none of these newspapers consumed $100,000 of paper and ink in either year, and thus none paid use tax on its consumption of paper and ink. In each year, 29 daily newspapers were published in Minnesota, six in the three largest metropolitan areas (Minneapolis, St. Paul, and Duluth). In 1974, only 11 publishers of those daily newspapers paid a use tax on paper and ink; in 1975, only 13 did so. In both years, Star Tribune paid nearly two-thirds of all use taxes collected from Minnesota newspapers.[3]

Thus, during 1974 and 1975, the use tax in question was imposed upon only 3 percent of all Minnesota newspaper publishers. During those years, no daily newspaper with a circulation of less than 12,500 paid any of this tax while all but one daily newspaper with a circulation greater than 12,500 paid some use tax in one year or the other. The amounts of use tax paid in 1974 varied widely, from $608,634 paid by Star Tribune to $120 paid by the *Fergus Falls Daily Journal*. (A-5-6, nn. 4, 5.)

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[2] Publishers can increase the flow of information to the public by publishing more pages, by increasing the frequency of publication or by increasing circulation. Consequently, each activity is protected by the First Amendment. The Minnesota Supreme Court appears to have assumed that only increasing circulation was protected activity. (A-15-16.) That assumption is mistaken. For example, in *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258 (1974), this Court held that the First Amendment prohibited government regulation of editorial decisions on the *size* as well as the content of a newspaper.

[3] During calendar year 1974, Star Tribune paid $608,634 of the $893,355 in total taxes collected, or 68 percent. (A-5, n.4.) During calendar year 1975, Star Tribune paid $636,113 of the $944,055 in total taxes collected, or 67 percent. (A-6, n.5.)

On May 30, 1980, Hennepin County District Judge Donald T. Barbeau granted Star Tribune's motion for summary judgment, holding the challenged tax unconstitutional as an abridgement of freedom of the press and as a denial of equal protection under both the federal and state constitutions. He concluded:

> The challenged use tax is not . . . a tax of general application. It is a limited, special tax, in its effect in the nature of a license tax, which abridges the freedom of the press in four ways:
>
> First, it taxes a select group of Minnesota publishers, leaving other Minnesota publishers free of its burden. This effect results from the $100,000 exemption.
>
> Second, it is specifically and exclusively directed at publications in general; no other industrial users of paper and ink products are subject to this use tax.
>
> Third, its direct tendency, if the tax is to be avoided, is to restrict circulation and thereby reduce the dissemination of information to the general public.
>
> Fourth, it is the practical and legal equivalent of a direct tax on the exercise of a First Amendment right because of its special and limited impact. (A-65-66.)

The State appealed, and the Minnesota Supreme Court reversed. (A-1-19.) That court characterized the tax as an ordinary form of taxation for the support of government, whose classifications were justified by the compelling government purpose of revenue-raising. It stated:

> The history and setting of section 297A.14 . . reveal that it is not a deliberate and calculated device in the guise of a tax imposed purposefully to restrict dissemination of the news and opinions appearing in newspapers

> distributed by publishers such as Star Tribune. It is part of a general system of sales and use taxation to which most goods (other than food, clothing, and medicine) are subject in Minnesota. Unlike the type of tax found to be unconstitutional in *Grosjean* [*v. American Press Co.*, 297 U.S. 233 (1936)], sales and use taxes are now commonplace and readily accepted. (A-12.)

The Minnesota Supreme Court justified the discriminatory use tax classification between publishers and nonpublishers on the ground that the goods produced by nonpublishers are subject to retail sales tax, whereas publications are statutorily exempt from any retail sales tax. The Court speculated that this arrangement "may be a result of the difficulties and expense of collecting sales tax upon sales of such low-priced items [publications]." (A-13.)

Having concluded that the use tax on publications' consumption of paper and ink "is constitutionally justified . . . as a revenue-raising measure," the Court held that the "$100,000 exemption itself is justified if it is an integral part of the sales and use tax system." (A-17.)

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

I. The Minnesota Supreme Court Misapplied the Constitutional Standard of Exacting Scrutiny.

This appeal presents important and substantial federal questions concerning the constitutionally permissible nature and extent of taxation upon the uniquely expressive features of newspapers.

According to a recent survey conducted by the American Newspaper Publishers Association, the majority of states (34) impose no sales or use tax whatsoever on newspaper advertising, circulation or consumption of paper. *Presstime*, December 1981 at 16. In an era when legislatures are seeking new sources of revenue and when large-circulation newspapers are popular targets of public and political criticism, Minnesota has devised a way to undermine much of the opposition to a new tax on the press by imposing it only upon a small group—large publishers. The $100,000 exemption eliminates the active opposition of most Minnesota publishers, including the small newspapers which are often the most vocal critics and supporters of rural legislators.

The Minnesota Supreme Court exacerbated the problems of this narrow, discriminatory tax on large newspapers by misapplying the constitutional standard of review. Taxation and regulation which infringe First Amendment rights are subject to strict or exacting scrutiny. *Citizens Against Rent Control v. City of Berkeley*, 50 U.S.L.W. 4071, 4072 (1981); *Police Department of City of Chicago v. Mosley*, 408 U.S. 92, 99, 101 & n.8 (1972); *NAACP v. Button*, 371 U.S. 415, 438 (1963); *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936). The State may justify limitations on First Amendment rights or discriminatory classifications under this standard only by showing that they are necessary or essential to accomplish a compelling state interest. *United States v. Lee*, 50 U.S.L.W. 4201, 4203 (1982); *Police Department of City of Chicago v. Mosley, supra* at 99; *In re Griffiths*, 413 U.S. 717, 721-22 (1973).

At oral argument before the Minnesota Supreme Court, counsel for the State conceded that "it would be very difficult to uphold this particular statute under the strict scrutiny stan-

dard of review." (A-29, 34.) Although the Minnesota Supreme Court purported to apply a "strict standard" of review (A-8, 12), in fact it applied only part of the test. It found a "compelling government purpose of revenue-raising" (A-1), but never expressly found that the discriminatory classifications of this particular tax were necessary to accomplish that purpose.

This superficial approach is clearly something short of strict scrutiny and in fact would shield any tax from successful judicial challenge. All taxes raise revenue, and all tax laws can be justified on that ground. Proponents of the Stamp Act of 1712 touted it as a way to keep the newspapers in hand and at the same time to raise large supplies of money for Queen Anne to fight the War of the Spanish Succession. J. B. Williams, "History of English Journalism" (1908), *quoted in Grosjean v. American Press Co.*, Appellees' Brief at 49-50; F. Siebert, *Freedom of the Press in England 1476-1776*, 309 (1952). Long after the censorious officials who enacted the Stamp Act's "taxes on knowledge" were dead and buried, the English government opposed efforts to repeal the taxes on knowledge because of the revenue loss which repeal would cause. *See, e.g.*, C.D. Collet, 1 *History of the Taxes on Knowledge*, 167-68 (1899); 2 *id.*, 67, 73, 96-97. That argument helped to delay repeal of the last of the taxes on knowledge until 1861, almost 150 years after their first enactment. 2 *id.* 119-34. In America, however, the First Amendment protected the press from the taxes on knowledge. *Grosjean v. American Press Co.*, 297 U.S. 233, 249 (1936). In *Grosjean*, this Court invalidated, as an abridgement of freedom of the press, a Louisiana license tax on advertising revenues which its sponsors had described as a measure to make newspapers pay a "license to do busi-

ness like everybody else does." *See Grosjean v. American Press Co.*, Transcript of Record at 47.

Unless the decision below is reversed, other States may be tempted to follow Minnesota's example. States must not raise revenue in ways which unduly infringe upon First Amendment activities. Minnesota failed to establish that any aspect of the challenged use tax was necessary to accomplish a compelling state interest. This challenged censorious and discriminatory taxation of newspapers merits plenary review, if not summary reversal, by this Court.

II. The Challenged Use Tax Abridges Freedom of the Press by Imposing a Classic "Tax on Knowledge" in Violation of *Grosjean v. American Press Co.*

The form and impact of the Minnesota use tax here at issue are strikingly similar to those of the Louisiana license tax which this Court invalidated in *Grosjean v. American Press Company*, 297 U.S. 233 (1936). In *Grosjean*, 13 newspapers were subject to a 2 percent license tax on gross receipts derived from advertising, while at least 124 newspapers paid no such tax, because the tax applied only if weekly circulation exceeded 20,000. *Id.* at 241. In the present appeal, approximately 3 percent of all newspaper publishers in Minnesota paid the use tax in amounts varying from $120 to $636,113, while the remaining 97 percent, with circulations of 12,500 per day or less, paid no use tax. (A-4-7.) Here, as in *Grosjean*, small rural publishers pay no tax, while large metropolitan publishers shoulder the entire tax burden.

In *Grosjean*, this Court invalidated the tax as an unconstitutional abridgement of freedom of the press. Its form demonstrated the Louisiana license tax to be a successor to the En-

glish and early American efforts to censor or control the press by taxation. 297 U.S. at 245-51. These "taxes on knowledge" took three principal forms: a stamp tax on the circulation of newspapers, a tax upon advertisements, and a tax upon paper itself. C. Duniway, *The Development of Freedom of the Press in Massachusetts*, 119-20, 133-37 (1906); T. May, 2 *Constitutional History of England*, 213-15 (1891); F. Siebert, *Freedom of the Press in England, 1476-1776*, 306-22 (1952). The First Amendment was enacted to preclude the government from adopting such taxes. 297 U.S. at 249.

The Louisiana tax in *Grosjean* combined two forms of taxes on knowledge, first by directly taxing advertisements, and second by tying that tax to increased circulation. Minn. Stat. §297A.14 embodies the third classic form of the taxes on knowledge—a tax on paper. Historically, a tax on paper was no less objectionable than a newspaper stamp tax and a tax on newspaper advertising.[4] As this Court recognized in *Grosjean*, the history of the First Amendment teaches that the very form of the taxes on knowledge renders them unconstitutional. 297 U.S. at 250.

The Minnesota Supreme Court attempted to distinguish *Grosjean* by referring to the peculiar history and setting of the

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[4] T. May, 2 *Constitutional History of England*, 215 (1891) ("Cheapness and expansion were evidently becoming the characteristics of the periodical press; to which every tax, however light, was an impediment. Hence a new movement for the repeal of all 'taxes on knowledge,' led by Mr. Milner Gibson, with admirable ability, address, and persistence. In 1853, the advertisement duty was swept away; and in 1855, the last penny of the newspaper stamp was relinquished. Nothing was now left but the duty on paper; and this was assailed with no less vigor. Denounced by penny newspapers, which the repeal of the stamp duty had called into existence; complained of by publishers of cheap books; and deplored by the friends of popular education, it fell, six years later, after a parliamentary contest memorable in history. And now the press was free alike from legal oppression and fiscal impediments.") (footnote omitted).

Louisiana gross receipts tax on newspaper advertising revenues, namely that the tax apparently had been enacted to penalize large newspapers that were political opponents of Governor Huey Long. (A-9-10.) However, *Grosjean* contained only a single veiled reference to the "present setting" of the Louisiana tax, 297 U.S. at 250; the primary reason for invalidating the tax was the lengthy history and potential of abuse of such taxes in general, and not the specific punitive intent of the particular Louisiana tax in question. *See also City of Tampa v. Tampa Times*, 153 Fla. 709, 15 So.2d 612, 613 (1943).

Proof of specific punitive intent is not a prerequisite for invalidating taxes which have a discriminatory impact upon the press. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 65 (1976) (Exacting scrutiny is necessary "even if any deterrent effect on the exercise of First Amendment rights arises, not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct . . ."); *NAACP v. Button*, 371 U.S. 415, 438-39 (1963) (Brennan, J.) ("Thus it is no answer to the constitutional claims asserted by the petitioner to say, as the Virginia Supreme Court of Appeals has said, that the purpose of these regulations was merely to insure high professional standards and not to curtail free expression."); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 461 (1958) ("In the domain of these indispensable liberties, whether of speech, press, or association, the decisions of this Court recognize that abridgement of such rights, *even though unintended*, may inevitably follow from varied forms of governmental action . . . Statutes imposing taxes upon rather than prohibiting particular activity have been struck down when perceived *to have the consequence* of unduly curtailing the liberty of freedom of press assured under the Fourteenth Amendment.") (emphasis added).

There is no official legislative history, apart from that which may be imputed from the changes in the statutory language, to establish the purpose of this challenged use tax.[5] It should not matter whether the tax seeks to achieve a legitimate objective but nevertheless has a significant effect upon freedom of expression, or whether the revenue-raising objective is a mere pretense and Minnesota actually seeks to control expression. Because intent may be ambiguous or impossible to prove in such cases, the ultimate issue must be whether the tax infringes upon freedom of expression. T. Emerson, *The System of Freedom of Expression*, 413-14 (1970). By its very na-

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[5] In Appellant's Informal Brief before the Minnesota Supreme Court at page 17, the State concedes: "The lack of any extant legislative history regarding the $100,000 exclusion makes it impossible to know precisely what purposes the legislature had in mind when it adopted the provision in 1973." The same vacuum exists with respect to the 1971 legislation. The absence of legislative history is the State's own responsibility. The Minnesota Legislature is well aware of how to make clear the objectives of its legislation, particularly when it anticipates litigation. *See Contos v. Herbst*, 278 N.W.2d 732, 734-35, 738 (Minn.), *appeal dismissed* 444 U.S. 804 (1979). It is also well aware of how to obscure its objectives. For example, both the Minnesota Senate and House of Representatives, by rule, provide for the recording of certain legislative proceedings and the preservation of the tape recordings in the Minnesota State Legislative Reference Library; however, those same rules expressly provide that the discussions on the tapes are not to be admissible in any court or administrative proceedings on the issue of legislative intent. *See* Rule 1.18 of the Rules of the Minnesota House of Representatives (". . . Discussion preserved under this rule is not intended to be admissible in any court or administrative proceeding on an issue of legislative intent."); Rule 65 of the Permanent Rules of the Senate (". . . It is the intention that testimony and discussion preserved under this rule not be admissible in any court or administrative proceeding on an issue of legislative intent.").

When legislation is subject to strict or exacting scrutiny, as is the challenged use tax here, proferred explanations of legislative purpose based on speculation and unsupported by evidence in the legislative record will not suffice. This Court does not accept mere recitations of benign purposes for legislation which impairs fundamental rights or involves suspect classifications, when those explanations are supplied only by hindsight or as an afterthought. *See, e.g., Califano v. Goldfarb*, 430 U.S. 199, 212-13 (1977); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 (1975); *Eisenstadt v. Baird*, 405 U.S. 438, 447-55 (1972).

ture, a tax on paper and ink consumed in publishing newspapers restricts the dissemination of information, and thereby abridges freedom of the press.

III. The $100,000 Exemption Restricts the Speech of Large Publishers and Conflicts With *Buckley v. Valeo* and Other Decisions of This Court.

The Minnesota Supreme Court suggested that the annual $100,000 per publication exemption feature of the challenged use tax "may be justified as a legislative policy to give favorable tax treatment to smaller enterprises. *Cf. Mabee v. White Plains Publishing Co.*, 327 U.S. 178, 184 (1946) (similar justification proffered)." (A-17.) *Mabee* is readily distinguishable because the particular provision of the Federal Fair Labor Standards Act there involved "was inserted to put those papers [small weeklies and semi-weeklies] more on a parity with other small town enterprises." 327 U.S. at 184. Minnesota's sales and use taxes contain no broad "small enterprise" exemption. The purpose of the challenged statute can be no broader than its actual effect: it favors small publishers and penalizes large publishers. In the present context, either effect is unconstitutional.

In *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court struck down provisions of the federal Election Campaign Act which imposed $1,000 limits on independent expenditures to advocate the election or defeat of clearly identified candidates for federal office. It rejected arguments that the government had a legitimate interest in equalizing the relative ability of individuals and groups to influence the outcome of elections, and stated:

> [T]he concept that government may restrict the speech of some elements of our society in order to enhance the rela-

> tive voice of others is wholly foreign to the First Amendment. . . ." (424 U.S. at 48-49.)

Mr. Justice Powell expressed similar views on behalf of this Court in *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), when he rejected the argument "that the State may control the volume of expression by the wealthier, more powerful corporate members of the press in order to 'enhance the relative voices' of smaller and less influential members." *Id.* at 791 n. 30. *See also Citizens Against Rent Control v. City of Berkeley*, 50 U.S.L.W. 4071, 4072 (1981) (Burger, C.J.).

These principles of constitutional law would prohibit Minnesota from forbidding a publication from consuming more than $100,000 of paper and ink annually. The challenged use tax involved here admittedly does not go that far, which prompted the Minnesota Supreme Court to distinguish *Buckley* by stating:

> By contrast, section 297A.14 is part of a general revenue-raising measure. Newspaper publishers are not prohibited from spending more than a given amount. (A-19.)

However, the constitutional principles espoused in *Buckley* and *First National Bank* go beyond outright prohibition. It is just as unconstitutional for government to restrict or limit the circulation of information by taxation as it is to prohibit the circulation. *Grosjean v. American Press Co.* Taxation may be less drastic than prohibition, but it may be no less constitutionally invalid.

As a result of the $100,000 exemption, Minnesota imposes the heaviest use tax burden upon those newspapers which publish the most pages, most often, to the most people. Such a tax clearly penalizes the circulation of information. It is the fact of

the improper tax burden, and not its amount, that is the objectionable factor. L. Tribe, *American Constitutional Law*, §16-8 at 1005 n. 18 (1978).

IV. The $100,000 Exemption Denies Equal Protection of the Laws by Imposing a Graduated Tax on Business Activity, and Conflicts with *Stewart Dry Goods v. Lewis*.

As the Minnesota Supreme Court acknowleged, the "practical effect of this [$100,000-per-publication] exemption during 1974 and 1975 was to relieve from payment of use tax all but a dozen or so publishers." (A-14.) The challenged use tax establishes two rates of taxation for otherwise identical First Amendment activities, depending only upon the identity of the publisher and the amount of consumption of paper and ink. The $100,000 exemption also produces a steeply graduated effective rate of use tax on a publisher's total consumption of paper and ink. Star Tribune, the largest Minnesota newspaper publisher, paid tax on its total use of paper and ink at the overall rate of 3.95 percent, while the second-largest publisher paid at the rate of 3.85 percent, the two next-largest publishers at about 3.33 percent, and the smallest publisher paying any tax at all paid at an effective overall rate of 0.117 percent—all under an ostensible flat rate "nondiscriminatory" tax of 4 percent. (A-90-92).

This Court has held that the gross sales of a merchant do not bear a constant relation to its net profits, and a graduated sales tax therefore unconstitutionally denies equal protection of the laws. *Stewart Dry Goods Co. v. Lewis*, 294 U.S. 550, 558, *reh. denied*, 295 U.S. 768 (1935). Similarly, a merchant's gross expenses—such as a publisher's consumption of paper and ink—do not bear a constant relation to its net profits. The re-

cent, much-publicized failures of major daily newspapers in such cities as Washington and Philadelphia illustrate the principle that a large-circulation newspaper is not necessarily a profitable newspaper. *See* "Washington Star Is to Shut Down After 128 Years," *The New York Times*, July 24, 1981, p. 1, col. 2; "Philadelphia's Bulletin, 1847-1982," *Newsweek*, February 8, 1981, p. 95, col. 2. A graduated tax upon large publishers' consumption of paper and ink therefore either restricts their size, frequency or circulation, or enhances the relative position of their smaller-circulation counterparts.

Although in 1939 it had endorsed the reasoning of *Stewart Dry Goods*,[6] the Minnesota Supreme Court rejected it here, stating:

> Section 297A.14 differs from the taxes rejected in those cases. It is not a "privilege" tax, supposedly justified because the value of the "privilege" increases in the higher brackets. Rather, the use tax is constitutionally justified . . . as a revenue-raising measure. The $100,000 exemption itself is justified if it is an integral part of the sales and use tax system. (A-17.)

Such semantic distinctions are squarely contrary to this Court's reasoning in *Stewart Dry Goods*: "In resolving the issue we are not concluded by the name or description of the tax as found in the act; our duty is to ascertain its nature and effect." 294 U.S. at 555.

Apparently in an effort to explain how the $100,000 exemption is "an integral part of the sales and use tax system," the Minnesota Supreme Court stated that "the legislature must classify or grant exemptions to insure that the burden upon

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[6] In *National Tea Co. v. State*, 205 Minn. 443, 286 N.W. 360 (1939), *vacated and remanded*, 309 U.S. 551, *affirmed on remand*, 208 Minn. 607, 294 N.W. 230 (1940).

the taxpayer in paying the tax or upon the state in collecting the tax does not outweigh the benefit of the revenues to the state." (A-18.) That speculation has no force whatsoever under the present circumstances. At a 4 percent tax rate, the $100,00 exemption confers a $4,000 tax benefit on each publication; in 1974, the State collected $120 in use taxes from the *Fergus Falls Daily Journal* (see A-5, n.4). In any event, administrative convenience simply is not a compelling state interest which will justify a classification which affects fundamental freedoms, including freedom of the press. *Stanley v. Illinois*, 405 U.S. 645, 656 (1972); *Reed v. Reed*, 404 U.S. 71, 76 (1971).

V. When It Has Chosen Not to Tax the Sale of Newspapers, Minnesota Cannot Impose a "Compensating" Use Tax Upon Paper and Ink if a Sales Tax Upon Newspapers Would Abridge Freedom of the Press, Nor Can it Create Discriminatory Classifications Between Publishers and Nonpublishers Which Are Not Necessary to the Accomplishment of a Compelling State Interest.

The Minnesota Supreme Court acknowledged that the challenged statute taxes newspaper publishers in a different manner than other industrial users of paper and ink (A-8), but upheld the statute because publishers paid a use tax while other industrial users' goods were subject to sales tax. This rationale requires two major assumptions: that a sales tax on publications would withstand constitutional scrutiny, and that the use tax imposes the same burden on newspapers that the sales tax imposes on other industrial users. Neither assumption is valid.

Although the constitutionality of a sales tax on newspapers is essential to the Minnesota Supreme Court's reasoning, it did

not directly address that issue. (A-13, n.10.) This Court need not decide this issue if the challenged use tax is invalid on the other grounds raised herein. Star Tribune submits, however, that a sales tax on publications—which the Minnesota legislature has chosen *not* to enact—would be unconstitutional. The sale of newspapers or other information is an activity protected by the First Amendment. *Heffron v. International Society for Krishna Consciousness*, 49 U.S.L.W. 4762, 4764 (1981); *Smith v. California*, 361 U.S. 147, 150 (1959). By imposing a sales tax upon the exchange of newspapers for consideration, the State would create a financial obstacle to the dissemination of information; if the buyer cannot or will not pay the additional amount necessary to satisfy the sales tax, the transfer of information will not occur. Minnesota prohibits the seller from absorbing the amount of sales tax. Minn. Stat. §297A.03. Although this Court never has given plenary consideration to the constitutionality of a direct sales tax on newspapers, it has invalidated state-created financial obstacles to communication in the form of license taxes. *Follett v. Town of McCormick*, 321 U.S. 573 (1944) (city could not require distributor of religious literature to obtain occupational license); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (city could not require occupational license for Jehovah's witness who distributed religious literature door-to-door and solicited purchases of books and pamphlets). *Jones v. City of Opelika*, 319 U.S. 103 (1943), *reversing and adopting dissenting opinions*, 316 U.S. 584 (1942) (invalidating annual occupational license to sell religious books).

The Minnesota Supreme Court found these cases inapposite on the authority of *Steinbeck v. Gerosa*, 4 N.Y.2d 302, 151 N.E.2d 170, *appeal dismissed*, 358 U.S. 39 (1958). (A-14). *Steinbeck* involved a "privilege tax" imposed on gross receipts received from trades, professions or commercial activities, in-

cluding the profession of author. As with the taxes measured by gross business receipts involved in *Tampa Times Co. v. City of Tampa*, 158 Fla. 589, 29 So.2d 368, *appeal dismissed*, 332 U.S. 749 (1947), and *Giragi v. Moore*, 64 P.2d 819 (Ariz.), *appeal dismissed*, 301 U.S. 670 (1937), the *Steinbeck* tax fell upon the accumulation of income by all businesses. As with any income tax, the financial burden on the press imposed by these taxes might have an indirect impact upon the amount of money they may spend on their business; unlike a direct sales tax, however, the gross receipts taxes are not interposed at the focal point of the constitutionally protected activity: the transfer of information.

If a sales tax on publications would be unconstitutional, Minnesota cannot impose it by indirection through deleting a statutory exemption from tax. The ability to strip the press of an existing statutory immunity from taxation, at any time and for any reason, raises the same specter of censorious abuse as does the ability to levy a special tax upon the press. *Speiser v. Randall*, 357 U.S. 513 (1958). Nor can Minnesota circumvent the invalidity of a sales tax on publications by imposing a special "compensating" use tax to which no other similarly situated taxpayer is subject. *Cf. Phillips Chemical Co. v. Dumas Ind. School Dist.*, 361 U.S. 376, 382-83 (1960); *Miller v. City of Milwaukee*, 272 U.S. 713 (1927).

Even assuming, however, that a sales tax on publications would be constitutional, the challenged use tax nevertheless can be upheld only if its burden is equivalent to that of a sales tax, because *Grosjean* prohibits special taxes which can be used to abridge freedom of the press. The challenged use tax does not fit neatly into "a general system of sales and use taxation to which most goods (other than food, clothing and medicine) are subject in Minnesota." (A-12.) Rather, it has unique

features which distinguish it from other Minnesota sales and use taxes.

First, no other general or special provision of Minnesota's sales and use tax laws provides a significant exemption based upon the dollar amount of purchase. That exemption conflicts with the supposed revenue-raising purpose of the tax.[7] The total taxes *collected* under this use tax on paper and ink during the years at issue were only about one-half of the potential revenue tax *loss* caused by the $100,000 exemption.[8] Even limiting consideration of the effect of the $100,000 per-publication exemption to those newspapers which actually paid some tax, the revenue loss from the exemptions for the 15 tax-paying newspapers in 1974 and the 16 tax-paying newspapers in 1975 nearly equalled the total taxes paid by all newspapers except the daily newspapers in Minneapolis and St. Paul.[9] If the $100,000 exemption were extended to all Minnesota taxpayers, the State would have lost 40 to 44 percent of all the sales and use tax revenues which it collected in the 1973-1975 period. (See Star Tribune's Memorandum in Support of Motion for Summary Judgment, Appendices B, C, D, and F.)

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[7] At a use tax rate of 4 percent and an exemption of $100,000 per publication, the revenue loss is $4,000 per publication. With approximately 400 Minnesota publications, the potential annual revenue loss is 400 times $4,000, or $1.6 million. Because not all publications consume $100,000 of paper and ink products, the actual revenue loss each year is somewhat less.

[8] Total revenues collected were $893,355 in 1974 and $944,055 in 1975. (A-5-6, nn. 4 & 5).

[9] In 1974, Minnesota collected $82,473 from all newspapers except the daily newspapers in Minneapolis and St. Paul. (A-5, n.4.) That year, 15 publications reached the $100,000 threshold and paid some tax. At $4.000 per publication, the $100,000 exemption cost Minnesota $60,000 in lost revenues that year from the taxpaying publishers alone. Similarly, in 1975, Minnesota collected $90,302 from all newspapers except the daily newspapers in Minneapolis and St. Paul, (A-6, n.5) while revenues lost from the 16 exemptions were $64,000. These figures do not include the potential revenues actually lost from other publications which failed to reach the $100,000 threshold and consequently paid no tax whatsoever.

The challenged tax on paper and ink also distorts the traditional function of a compensating use tax. A compensating use tax is a fairly common feature of a State's overall sales and use tax statutes, and is "intended to protect both local merchants and the local treasury by taxing the intrastate use of property which would have been subject to the sales tax had it been purchased within the state." Note, *Economic Neutrality and the Compensating Use Tax*, 16 Stan. L.Rev. 1016 (1964) (footnotes omitted). In contrast, the use tax on paper and ink does not reach out-of-state transactions at all. Only Minnesota publishers pay the use tax, but all publications sold in Minnesota are exempt from the sales tax, regardless of where they are published. Minn. Stat. §297A.25, subd 1 (i). If Minnesota attempted to impose greater taxes on foreign businesses than on domestic business, it would violate constitutional protections of interstate commerce under principles articulated by this Court since at least *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937). Similarly, this Court should hold that Minnesota has violated the First Amendment by singling out its domestic publishers to pay higher taxes than foreign publications doing business within the State based upon identical activity. To the extent that proof of a discriminatory motive is necessary in this case, it may be inferred from the fact that Minnesota's domestic publishers which are subject to the tax are more likely to criticize the State government on a regular basis than are the foreign publishers which are exempt from sales and use taxes.

Finally, the use tax on newspapers' consumption of paper and ink is a striking departure from what the Minnesota Supreme Court describes as a "statutory scheme . . . to devise a unitary tax which exempts intermediate transactions and imposes it only on sales when the finished product is purchased by the ultimate user." *Standard Packaging Corp. v. Commis-*

sioner of Revenue, 288 N.W.2d 234, 239 (Minn. 1979). The "industrial use" exemption applies to all materials used or consumed in agricultural or industrial production of personal property "intended to be sold ultimately at retail," but does not require that the ultimate sale at retail itself be subject to tax. The industrial user of paper and ink pays no tax on his consumption, regardless of whether his final product is a taxable roll of wrapping paper, a tax-exempt milk carton (Minn. Stat. §297A.25, subd. 1 (a)), or a tax-exempt school textbook (Minn. Stat. §297A.25, subd. 1 (v)). Of all instances in which the sale of a final product is tax-exempt, only publications are subjected to a "compensating" use tax on consumption of materials used to make that final product.

The Minnesota Supreme Court did not address the issue of the necessity of the disparate treatment between publishers and other industrial users. Its sole suggested reason for subjecting newspapers to a use tax rather than a sales tax was "the difficulties and expense of collecting sales tax upon sales of such low-priced items". (A-13.) However, the State taxes the sales of many other low-priced items as diverse as pipe cleaners, picture hangers, toothpicks, paper clips and six-inch plastic rulers; it presently exempts only sales where the sales price is nine cents or less. Minn. Stat. §297A.03, subd. 2 (1981).

The challenged statute's disparate treatment of publishers and other industrial users of paper and ink certainly is not necessary to the accomplishment of any compelling state interest, and must be invalidated. A State may not constitutionally tax publishers on a different basis and at a different rate than it taxes other persons, simply by codifying the publishers' tax as part of a broad taxing statute. Minnesota has made a policy decision, supported by constitutional principles (as even the State's counsel concedes, A-34-35), to exempt newspapers from

its sales tax. There is no compelling state purpose for Minnesota to circumvent that exemption by imposing a discriminatory use tax upon paper and ink consumed by large Minnesota newspapers.

CONCLUSION

The decision of the Minnesota Supreme Court undermines fundamental First Amendment principles. The questions presented by this appeal are substantial. Star Tribune urges this Court to note probable jurisdiction and to set the case for full briefing and argument on the merits.

Respectfully submitted,

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